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Thursday, June 28, 2007

A very brief history of due process

The history of the Due Process Clause in the United States' Constitution, and how it came to cover everything from (at various points in U.S. history) freedom of contract to abortion, is a long story which I should tell some day, but here is a very short version. It starts with the idea of a "common law" or "due process" -- synonyms in late medieval and Renaissance English law. Then these phrases meant not substantive judge-made law (as "common law" means today) but a group of procedural rights and principles which courts had slowly developed through precedent and that all royal courts in England (even to some extent privately owned courts) were expected to respect. One of these basic due process principles was that a court could not "take property from A and give it to B" except as a remedy for a wrong done by A to B. The Due Process Clause of the 5th and 14th Amendments -- "no deprivation of life, liberty, or property without due proces of law" -- was meant as a reference to these basic rights and principles, as well as to the continuing precedential development of such rights and principles by courts.

The basic idea behind the *Lochner* line of cases was that minimum wage laws, maximum hour laws, and such were taking property from one group (e.g. capital) and giving to another (e.g. labor) even though the one group had done the other no adjudicated wrong. But since many government laws even in the 19th century did redistribute rights people value from one class to another like this, this way of applying due process principles was too broad an attack on statutory sovereignty and practical politics to work without some compromises.

But it was too late to discover such compromises throught the slow process deciding disputes and discovering rules, before being swamped by the tide of Progressive statutory sovereignty. The *Lochner* line of cases quickly became hedged about and mutated: the principle involved was later said to be freedom of contract (both an employer's and a worker's rights were violated by such laws, rather than the problem being a redistribution without a wrong), and it was held (even before the New Deal) that a government merely had to come up with a "rational basis" to justify taking in this loose sense from group A to give to group B, etc.

After Footnote Four, "merely economic" rights like property were derogated -- it became trivial for government to "prove" a "rational basis." So we now find "rational basis" applied to most kinds o f rights while an "important/compelling governmental interest" is applied to important personal and political rights like contraception, abortion, free speech, voting, interstate travel, etc. (BTW, that U.S. courts find interstate travel to be a fundamental right is very interesting in light of the importance of low exit costs in fostering healthy legal and political competition).

The "rational basis" test is the state of *Lochner* precedent today -- a trivial test that "merely economic" laws practically always pass, in contrast to the "rationality-with-teeth" of personal rights cases like *Lawrence v. Texas*. Nominally, however, the test of *Lawrence* is the

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same as the test of *Lochner*, and both are good law, so that it takes only a court sympathetic with property rights to revive *Lochner*.

Such a development may take the form of an elephant that is in the room of modern due process cases -- freedom of contract. Implicit in *Griswold, Planned Parenthood v. Casey,* and many other such cases is not only a personal right, but a freedom of contract that is quite necessarily associated with this personal right. Without freedom to contract with an abortion provider, the right of a woman to get an abortion would be unduly burdened. Only this can explain why a contraception clinic is able to sue for a right to vend, not merely use, contraception, and Planned Parenthood is able to sue for a right to provide abortion services, not merely for a right of a woman to have an abortion.

The same is true for almost any other fundamental right. Our crucial right of interstate travel, for example, must involve to at least some extent the freedom to contract with an airline company (buy a plane ticket and travel), to purchase a motor vehicle, to contract with a car rental company, and so on. This being the case, our courts should recognize that freedom of contract is not "merely" an "economic right." It is also a basic political right. Our courts should recognize a general freedom of contract, which becomes a fundamental right if it involves a contracting about a fundamental right, whether that be buying condoms (*Griswold v. Conneticutt*) or sending our children to private schools (*Pierce v. Society of Sisters*).

Posted by Nick Szabo at 6:40 PM

3 comments:

Adam said...

I'm sort of surprised you make no reference to Hayek in the economic rights are fundamental rights argument. He laid that out very plainly in eg, Road to Serfdom.

11:48 AM

nick said...

Well, I did say "very brief", and so, along with cutting out many important developments within the legal community, I cut out all ideas outside of that community that influenced (or in this case, should have influenced but failed to) its development. I also gave shockingly short shrift to the natural rights tradition, which had a very big influence on substantive due process. And alas, Hayek did not come along soon enough to save us from Footnote Four, nor forcefully enough to create a strong movement to overturn that precedent.

5:48 PM

Rodrigo said...

Oi, achei teu blog pelo google tá bem interessante gostei desse post. Quando der dá uma passada pelo meu blog, é sobre camisetas personalizadas, mostra passo a passo como criar uma camiseta personalizada bem maneira. Se você quiser linkar meu blog no seu eu ficaria agradecido, até mais e sucesso. (If you speak English can see the version in English of the Camiseta Personalizada. If he will be possible add my blog in your blogroll I thankful, bye friend).

5:21 AM

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